**Office of Chief Counsel**
**Internal Revenue Service**

# memorandum

CC:LM:NR:HOU:1:TL-N-6774-99
CDMoss

date: April 27, 2001

to: Phillip Vice, Team Manager, LMSB, Natural Resources, Houston Stop 4108 HOU
Attn: S.T. Cano, Senior Team Coordinator

from: Area Counsel
(Natural Resources:Houston)

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subject: [redacted]
**Consent to Extend Statute of Limitations**

Earliest Statue Expires: [redacted]

This memorandum responds to your request for assistance made on February 26, 2001 regarding the proper parties to execute agreements to extend the statute of limitations for assessment, as detailed below.

**ISSUES**

1. Who is the proper party to execute an agreement to extend the statute of limitations for assessment on behalf of [redacted], which filed consolidated returns as the common parent of an affiliated group for the taxable years at issue ([redacted], [redacted] and [redacted]), where subsequently [redacted] became a subsidiary of [redacted], in a reverse acquisition, changed its name to [redacted] but continued to exist?

2. Who is the proper party to execute an agreement to extend the statute of limitations for assessment on behalf of [redacted], which filed separate corporate tax returns for the tax years at issue ([redacted] and [redacted]), apart from the consolidated returns filed by [redacted] for those tax years

3. Who is the proper party to execute an agreement to extend the statute of limitations for assessment on behalf of

[redacted], which filed returns electing to be treated as a partnership for the tax years at issue ([redacted][1] and [redacted])?

4. Who is the proper party to execute an agreement to extend the statute of limitations for assessment on behalf of [redacted], which filed partnership returns for the tax years at issue ([redacted] and [redacted]) where [redacted], a subsidiary of [redacted] is the tax matters partner?

**RECOMMENDATIONS**

Based on the facts as presented and the analysis below, we recommend the following language be used for the Form 872's:

**Issue 1**

We recommend the caption line of the Form 872 read as follows:

**[redacted], formerly known as [redacted]***

*** This is in respect to the consolidated tax liability of [redacted] consolidated group for the taxable year _____.** [Fill in blank as appropriate for TYE [redacted], [redacted] and [redacted].]

We recommend securing the signature of an authorized officer of [redacted] on the signature block of Form 872 and noting on the signature block on page 2 of Form 872 as follows:

**[name of current officer]**

**[title of officer]**

**[redacted]**

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[1] The [redacted] tax return covers a one day taxable period beginning and ending on [redacted].

We also recommend inputting the E.I.N. of [redacted] in the box on the Form 872 labeled "SSN or EIN."

**Issue 2**

We recommend that the caption line of the Form 872 read:

[redacted]

The signature line of the Form 872 should read:

**[name of current officer]**

**[title of officer]**

[redacted]

**Issues 3 and 4**

For the TYE [redacted] and [redacted], if the Tax Matters Partner was a member of the [redacted] consolidated group, both the Tax Matters Partner and the common parent of the group should sign the Form 872-P. Accordingly, for each of the TEFRA entities, the Form 872-P should be completed as follows:

Caption line: [name of TEFRA entity]

3. [redacted]

4. [redacted], **formerly known as** [redacted]

The signature block of the common parent should appear as follows:

[redacted], **formerly known as** [redacted]

**by [name of authorized representative, title], on behalf of**

**[name of Tax Matters Partner], Tax Matters Partner of [name of TEFRA entity]**

The signature line for the member Tax Matters Partner should appear as follows:

[name of member subsidiary corporation],

by [name of authorized representative, title], Tax Matters Partner of [name of TEFRA entity].

**Additional Information**

At the time the Form 872 is presented to the taxpayer for execution, please notify the taxpayer that the taxpayer may (1) refuse to extend the period of limitations or (2) limit the extension to particular issues or to a particular period of time. I.R.C. § 6501(c)(4)(B). The statutory notice requirement under I.R.C. § 6501(c)(4)(B) generally applies to requests to extend the period of limitations made after December 1, 1999.

If you have not already done so, we recommend that you verify the E.I.N.s of the respective corporations to be shown on all of these Forms.

Please also note that IRM 121.2.22.3 requires use of Letter 907(DO) to solicit the Form 872, and IRM 121.2.22.4.2 requires use of Letter 929 (DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer it should be promptly signed and dated in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 121.2.22.3. You will also need to update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

**FACTS**

On [redacted], and [redacted][2] entered into an agreement and plan of merger. Pursuant to the

[2] All three entities are corporations organized under the laws of the State of Delaware.

agreement, [redacted], a wholly owned subsidiary of [redacted], was merged into [redacted], with [redacted] remaining as the surviving corporation and becoming a wholly owned subsidiary of [redacted]. The merger became effective as of [redacted]. As part of the merger, [redacted] stockholders received [redacted] shares of [redacted] common stock for each share of [redacted] common stock and a designated number of shares of [redacted] common stock for their convertible preferred stock.[3] Accordingly, on [redacted], [redacted] issued approximately [redacted] shares of [redacted] common stock in exchange for [redacted] stock and issued an additional [redacted] shares of [redacted] common stock in exchange for [redacted] stock options. This results in [redacted] owning [redacted]% of [redacted] and the former [redacted] stockholders owning approximately [redacted]%[4] of the total outstanding shares of [redacted] stock.

On [redacted], [redacted] changed its name to [redacted]. On [redacted], [redacted]'s wholly owned subsidiary, [redacted], merged upstream with and into [redacted], with [redacted] remaining as the surviving corporation. On that same date, [redacted] changed its name to [redacted].

The parties stated in the joint proxy statement that they intended the "merger" between [redacted] and [redacted] to qualify as a "reorganization" under I.R.C. § 368(a). It also constitutes a reverse acquisition as defined in Treas. Reg. § 1.1502-75(d)(3).[5]

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[3] Each share of [redacted]'s cumulative convertible preferred stock, Series A and B was converted into [redacted] shares of [redacted] common stock. Each share of [redacted]'s cumulative convertible preferred stock, Series C was converted into [redacted] shares of [redacted] common stock.

[4] This is the percentage stated in the joint proxy statement/prospectus issued on [redacted]. The actual percentage owned by former [redacted] stockholders as of [redacted] may be higher because of the higher number of shares of [redacted] common stock actually issued on [redacted] vs. the number estimated in the joint proxy statement.

[5] This occurs when the common parent or any member of its consolidated return group (the acquiring corporation) acquires

It is our understanding, based on statements from counsel for [redacted] and [redacted], that each of the subsidiaries included in [redacted]'s affiliated group continue to be owned by [redacted] (now [redacted]). In addition, the ownership of all partnerships, including [redacted] and [redacted], of which [redacted] and/or one of its subsidiaries is a general partner and/or tax matters partner, does not change as a result of this "merger." The same is true with respect to [redacted] that was formed by [redacted] in [redacted], but because [redacted] did not satisfy the [redacted] percent stock ownership requirements of I.R.C. § 1504 with respect to [redacted]'s stock, [redacted] filed separate corporate tax returns for [redacted] and [redacted] (tax years in issue).

[redacted] was formed on [redacted] as a Delaware limited liability company. As of [redacted], [redacted] was owned by two members; [redacted] ([redacted]%) and [redacted] ([redacted]%). On [redacted], [redacted] companies owned by [redacted], which is wholly owned by [redacted], a wholly owned subsidiary of [redacted], merged into [redacted], resulting in [redacted] being owned by the following members: [redacted] ([redacted]%), [redacted] ([redacted]%), and [redacted] ([redacted]%). On that same date, [redacted] transferred its [redacted]% interest in [redacted] to its parent, [redacted]. Effective [redacted], [redacted] changed its name to [redacted].

[redacted] filed a [redacted] Form 1065, partnership return for the taxable period beginning and ending on [redacted]. The [redacted] return did not designate a tax matters partner. The [redacted] partnership return filed by [redacted] designated [redacted] as the tax matters partner for the partnership.

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the stock or substantially all the assets of another corporation (the acquired corporation) and, after the acquisition, the stockholders of the acquired corporation, as a result of owning stock of the acquired corporation, (immediately before the acquisition) own (immediately after the acquisition) more than 50 percent of the fair market value of the outstanding stock of the acquiring corporation.

## LAW AND ANALYSIS

**Issues 1 and 2**

Treas. Reg. § 1.1502-77(a) generally provides that the common parent, for all purposes (except those not applicable herein), shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. Except as provided in the preceding sentence, no subsidiary shall have authority to act for or to represent itself in any such matter. In the case of a subsidiary that previously filed as a common parent, we assume that the referenced provision allows such a subsidiary to act as the sole agent for the year when it previously filed as a common parent. A "common parent" is a corporation that files income tax returns on a consolidated basis for an affiliated group of corporations. See I.R.C. § 1504(a); Rev. Proc. 99-9, 1999-1 C.B. 278.

Treas. Reg. § 1.1502-77(c) provides that, unless the district director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year shall be applicable (1) to each corporation which was a member of the group during any part of such taxable year; and (2) to each corporation the income of which was included in the consolidated return for such taxable year, notwithstanding that the tax liability of any such corporation is subsequently computed on the basis of a separate return under Treas. Reg. § 1.1502-75.

Treas. Reg. § 1.1502-75(d)(1) provides the general rule that an affiliated group is deemed to remain in existence as long as the common parent remains the common parent and at least one subsidiary remains affiliated with it. The affiliated group is still deemed to remain in existence even though the common parent does not remain the common parent, like in [redacted]'s situation, if one of the three following exceptions apply where: (1) there is a reverse acquisition under Treas. Reg. § 1.1502-75(d)(3); (2) the common parent undergoes an I.R.C. § 368(a)(1)(F) reorganization; or (3) there is a downstream transfer of the common parent's assets under Treas. Reg. § 1.1502-75(d)(2)(i) and (ii). The first exception would apply in this case.

The reverse acquisition rule provides that an affiliated group will not terminate where the stock or assets of the common parent are acquired by another corporation in exchange for the stock of that other corporation, provided that the shareholders of the acquired common parent, after the acquisition, own more than 50 percent of the value of the acquiring corporation's stock. Treas. Reg. § 1.1502-75(d)(3)(i). If the acquiring corporation, before the acquisition, is a common parent of an affiliated group, that group is deemed to terminate even though the acquiring corporation/common parent continues to exist for all purposes except those of the consolidated return provisions. The rule is clearly designed to eliminate the discretion that shareholders of two merging groups might otherwise have to determine which group survives, given the shareholders' ability to select which parent survives the merger. See Southern Pacific Company v. Commissioner, 84 T.C. 395 (1985).

In Southern Pacific, the Tax court held that, for any given year in which a consolidated return is filed, the common parent for that particular year is thereafter the sole agent with respect to any procedural matter that may arise in connection with the group's tax liability for that year. Id. at 401. Applying this principal and the previously cited regulations to the instant facts yields a conclusion that [redacted] f/k/a [redacted] would be the sole agent to execute a Form 872 for the taxable years when it filed a consolidated return as the common parent (Issue 1).

However, the Court in Southern Pacific also held that where the reorganization involves a reverse acquisition, like is present in the instant case, the reverse acquisition rule in Treas. Reg. § 1.1502-75(d)(3)(i) applies in determining which entity succeeds the common parent as agent for the affiliated group with respect to years both before and after the reverse acquisition and the reverse acquisition rule overrides Treas. Reg. § 1.1502-77 in that context. Id. at 404.

The taxpayer in Southern Pacific ceased to exist as a common parent after the reverse acquisition. Here, [redacted] f/k/a [redacted], the old common parent, continues to exist after the reverse acquisition, but becomes a wholly owned subsidiary of [redacted].

Treas. Reg. § 1.1502-77T provides alternative agents

for the affiliated group in a situation in which the corporation that is the common parent of the group ceases to be the common parent. This section applies to statutory notices and waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988; thus, it applies to the taxable years in issue.

Treas. Reg. § 1.1502-77T(a)(4) provides for alternative agents to sign a waiver of the statute of limitations and to be issued a notice of deficiency. The corporations which may be alternative agents include:

(i) The common parent of the group for all or any part of the year to which the waiver applies;

(ii) A successor to the former common parent in a transaction to which section 381(a) applies;

(iii) The agent designated by the group under Treas. Reg. § 1.1502-77(d); or

(iv) If the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or (3), the common parent of the group at the time the waiver is given.

An exception to the first alternative is when the common parent is not in existence at the time such waiver is necessary. The common parent is considered to have gone out of existence when it formally dissolves under state law or merges into another corporation. Here, although [redacted] merged into [redacted], [redacted] remained as the surviving corporation and kept its Employer Identification Number. Accordingly, that exception would not apply.

Therefore, the first alternative corporation under Treas. Reg. § 1502-77T(4)(i), [redacted] f/k/a [redacted], is an alternative agent to execute the waiver in our facts because it was the parent during the taxable years in issue.

In addition, under section 1.1502-77T(4)(iv), [redacted] f/k/a [redacted] would also be an alternative agent, because under Treas. Reg. § 1.1502-75(d)(3), the group of which [redacted] was the common parent immediately before the acquisition is treated as remaining in

existence with [redacted] f/k/a [redacted] becoming the common parent of the group.

This conclusion is consistent with Union Oil Company of California v. Commissioner, 101 T.C. 130 (1993), where the Tax Court held that if the old common parent in a reverse acquisition under Treas. Reg. § 1.1502-75(d)(3)(i) continues to exist after the reorganization, both the old common parent and the new common parent are agents for the affiliated group for purposes of the issuance of notices of deficiency for years before the reverse acquisition.

Accordingly, [redacted] f/k/a [redacted] can execute the waiver for the taxable years in issue for which it filed consolidated returns on behalf of [redacted] as an alternative to the new parent, [redacted] f/k/a [redacted].

With respect to [redacted], because it was not part of the affiliated group and was not included on the consolidated returns for tax years [redacted] and [redacted], its ownership is also not affected by the "merger" with [redacted]. Accordingly, the waiver for [redacted] for tax years [redacted] and [redacted] should be signed an authorized officer of [redacted].

**Issues 3 and 4**

The statute of limitations for making assessments related to partnership items may be extended pursuant to I.R.C. § 6229(b). Section 6229(b)(1)(A) states that the statute of limitations may be extended (for all the partners) by an agreement entered into by the Secretary and the tax matters partner, before the expiration of the limitations period. I.R.C. § 6231(a)(7) defines tax matters partner. That section provides that the tax matters partner is the general partner so designated as the tax matters partner or if no designation is made, the general partner having the largest profits interest at the end of the year.

Treas. Reg. § 1.301.6231(a)(7)-2 sets forth the procedures for designation or selection of a tax matters partner for a limited liability company (LLC). The regulation provides that for purposes of applying section 6231(a)(7) and § 301.6231(a)(7)-1 to an LLC, only a member-manager of an LLC is treated as a general partner, and a member of an LLC who is

not a member-manager is treated as partner other than a general partner. A member-manager is defined as one who alone, or with others is vested with the continuing exclusive authority to make the management decisions necessary to conduct the business for which the LLC is formed. See Treas. Reg. § 1.301.6231(a)(7)-2(b)(3). If there are no elected or designated member-managers, each member will be treated as a member-manager(general partner) for purposes of the regulation. The regulation is effective with respect to all designations, selections, and terminations of a tax matters partner of an LLC occurring on or after December 23, 1996.

With respect to [redacted], because the ownership of the partnership did not change as part of the "merger" with [redacted], the waiver should be executed by an authorized officer of the tax matters partner. The designated tax matters partner for [redacted] and [redacted] for [redacted] is [redacted], a subsidiary of [redacted]. Because [redacted] is a subsidiary of a consolidated filing group and the waiver relates to extending the statute with respect to the partnership, we recommend that you have an authorized officer of [redacted] f/k/a [redacted] sign the waiver on behalf of the subsidiary, tax matters partner and an authorized officer of the subsidiary sign the waiver on behalf of the tax matters partner subsidiary.

With respect to [redacted], because the ownership of the entity also did not change as part of the "merger" with [redacted] the waiver should be executed by an authorized officer of the tax matters partner for the partnership. With respect to the partnership return filed for the one day tax year beginning and ending [redacted], no designation of a tax matters partner was made.

It is our understanding, based on the facts stated on page six above, that as of the end of the taxable year ending [redacted], [redacted] was owned by the following members: [redacted] ([redacted]%), [redacted], and [redacted] [redacted]%). We have not been provided a copy of any limited liability company agreement for this entity. Therefore, unless any limited liability company agreement designates one or more of these entities as a member-manager, then all the members would be treated as general partners for purposes of

Section 6231(a)(7) and the member general partner with the largest profits interest at the end of the year would be the tax matters partner for the tax year. It appears that [redacted] would be deemed the tax matters partner, being the largest percentage owner of the entity. Accordingly, an authorized officer of [redacted] would be the proper party to sign the consent for the [redacted] year. With respect to tax year [redacted], the return designates [redacted] as the tax matters partner for the entity.

As stated above with respect to [redacted], because the deemed ([redacted]) and designated ([redacted]) tax matters partner is a subsidiary of [redacted], we recommend that you have an authorized officer of the parent sign the waiver on behalf of the subsidiary, tax matters partner and an authorized officer of the subsidiary sign the waiver on behalf of the tax matters partner subsidiary.

Also, the wording on the waiver for both [redacted] and [redacted] should reflect the change in name of [redacted] to read "[redacted] f/k/a [redacted]".

If you have any further questions regarding these matters, please contact me at (281) 721-7364.

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By:_____
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